The Use of Criminal Record Checks To Screen Individuals Working With Vulnerable People

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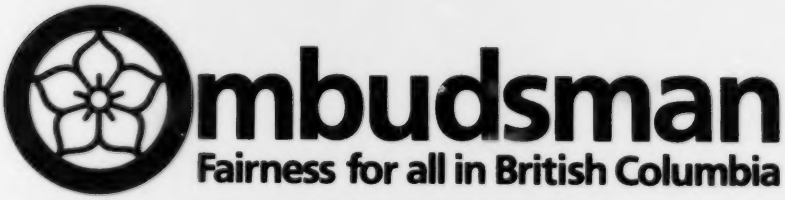

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OMBUDSMAN OF BRITISH COLUMBIA

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PUBLIC REPORT #5

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INTRODUCTION: The history and the scope of the use of criminal record checks to screen individuals working with vulnerable people

The general initiatives taken by government to use criminal record information as an employment screen for positions of trust with vulnerable people to date, are as follows:

In 1985 the Ministry of Human Resources began advising foster parents of the requirement of criminal record checks for all persons who were entrusted by the Superintendent of Family and Child Service to care for

someone else's child. A criminal record check applies to all adults acting in a parental role in the home and to any dependent, 18 years or older, residing in the home.

The Ministry began to inform societies and individuals who contract to provide services to children with the Ministry, that a condition of contracting was that the independent contractors must have their employees and volunteers undergo criminal record checks.

New personnel policy also directed that before anyone was hired for a position within the Ministry that involved the care, custody, legal responsibility or counselling of the Ministry's clients, a criminal record check must be completed.

By early 1986 representatives of the Ministries of Education, Human Resources, Attorney General and Health had been meeting to plan the expansion of criminal record checks to their new employees and to implement co-ordinated procedures.

On September 30, 1986, the 7th Master and Component Agreement between the Province of B.C. and the B.C. Government Employees Union concluded a memorandum of agreement which established that all existing public

service employees whose work assignments bring them into contact with vulnerable individuals (including children) are required to authorize disclosure of their police records.

The use of criminal record information as a condition of employment for positions of trust has already affected a large number of British Columbians.

The Ministry of Social Services and Housing's policy has resulted in the criminal record checking of at least 5,000 foster parents and at least 2,245 private sector employees delivering services primarily, to children.

According to a provincial child care facilities licensing consultant, the 2,500 licenced child care facilities have approximately 10,000 people occupying positions of trust who will have to be checked when current policy expands.

If the Ministry of Education extends this method of screening to full and part time teachers in the B.C. public school system, then an estimated 29,500 more people will be police record checked.

Approximately 5,000 existing public sector employees working in positions of trust are also in line to be checked. This has quickly added up to be over 50,000 people.

PART ONE: An overview of the objective of this Report

The use of criminal record checks as a condition of employment is a critical and complex issue: complex because it involves more than just a simple conflict between employers' interests in disclosure and individuals' interests in privacy. Critical because society's interests in the effective functioning of its public services and the welfare of all its citizens are profoundly affected by the standards that govern employer access to criminal history data.

The paramount interest in the protection of children and mentally and physically handicapped adults is recognized in our society and this is reflected in our laws and public services. One of the ways to protect such vulnerable individuals is to screen out inappropriate people from providing public services to them. An extraordinary method of screening, recently initiated by government policy, is criminal record checks. This preventative approach requires administrative policy that balances the need to assure the safety of vulnerable people and the rights of employees and applicants to privacy and be free of arbitrary employment restrictions.

The objective of this report is to provide recommendations regarding the use of criminal record checks in the development of a comprehensive, fair and effective screening process. Throughout the body of this Report all recommendations are printed in bold face and the major ones are summarized in the final chapter.

1. Interest of Ombudsman's Office

(a) Responsibility under the Ombudsman Act

In interpreting the scope of the investigatory jurisdiction of the Ombudsman, the Supreme Court of Canada found that the Ombudsman's jurisdiction to investigate included:

> "everything done by governmental authorities in the implementation of government policy". [1]

The Ombudsman's review of government policy of criminal record check use falls within the Ombudsman's exercise of his broad investigatory function. Under section 30(2) of the Ombudsman Act, where the Ombudsman considers it to be in the public interest, he may comment publicly respecting a matter relating generally to the exercise of his duties.

(b) **Complaints Received**

The Ombudsman has received complaints and inquiries about criminal record checks from all areas of the Province.

These serve as illustrations of the perceived public impact of the policy and are in the process of being investigated by the Ombudsman's office. No conclusions have been reached on the merits and these examples do not represent a finding of fault.

They include the following:

1. An employee of a society in the Interior which contracts to run adult group homes has a record of possession of heroin in the late '70s. He has rehabilitated himself and has applied for a pardon but has not yet received one. His concern was that a criminal record check might result in job loss and also damage to his reputation. Apparently the results of criminal record checks of other society employees have become public knowledge as a result of board discussion of these matters.

2. A society in the Kootenays contracting to provide services, was concerned that the Ministry of Social Services and Housing required criminal record checks of staff, volunteers and board members who do not have any direct contact with children. This society has not complied with this requirement and has never had any follow-up to check compliance.

3. A foster parent in Vancouver objected to the use of criminal record checks which include consideration of charges, as well as convictions. She was also concerned that there was no method of an appeal if her continued approval as a foster parent was placed in jeopardy.

4. An experienced child care worker was refused employment when he declined to sign a Vancouver City Police form which authorized release of "criminal convictions, criminal charges and allegations of criminal conduct" to his employer. He thought the check for convictions was valid, but he objected to the inclusion of charges and allegations in the check.

5. A foster parent to three siblings for nine years was advised that, unless she wanted to jeopardize the children's placement in her home, criminal record checks would be required of all the adult members of her household. She believes the Ministry had ample proof of her suitability as a foster parent without requiring this procedure.

6. An applicant for a position of youth services street worker with a lower mainland society, alleged that a Vancouver City Police officer called a Social Services and Housing employee and discussed police information concerning him. The Ministry employee then contacted the society and effectively closed the door on his employment. He was concerned that he did not have full opportunity to present his application for employment with the Society.

7. A volunteer for 2 1/2 years with a major youth association in the lower mainland said that prior to approval as a volunteer she had a six hour orientation, filled out an extensive

personal history questionnaire, provided three personal references who were all contacted, and had a lengthy one-to-one interview. She had been monitored regularly on her performance as a volunteer and thought there was ample material to screen her suitability. She considered the criminal record check to be an infringement of her privacy in view of her demonstrated success as a volunteer.

8. A child care worker with a society in the Cariboo was worried the police would disclose to his employer, information from an investigation 9 years ago that had not resulted in charges and thereby adversely affect his employment.

9. A couple in southern B.C. were advised that their home study as an adoptive home would not continue after they disclosed that the husband had been convicted for theft. They were told that since the Ministry had more adoptive families than children to be adopted, that the existence of his criminal record disqualified them. This case is now being reconsidered.

10. A School of Social Work graduate alleged that he had his offer of employment with Social Services and Housing withdrawn when the Regional Manager advised him that his record of convictions for possession of a narcotic and breaking and entering within the last ten years rendered him unsuitable for the position. He chose to hire a lawyer and file a complaint pursuant to the B.C. Human Rights Act. The hearing has taken almost 5 months to complete.

(c) **Requests for Ombudsman initiative.**

In addition to complaints from individuals, there has been interest in an Ombudsman review of the present policy on criminal record checks expressed by many independent contractors working with the Ministry of Social Services and Housing, by the B.C. Association of the Chiefs of Police, by members of the Provincial Child Care Facilities Licensing Board and by the Interministerial Committee; a committee working for inter-ministerial consistency in the implementation of this policy.

(d) **Focused perspective on fairness issues.**

The expertise of the Ombudsman's Office is in administrative fairness. The focus of the study of criminal record checks is to ensure that governmental authorities develop administrative policy which serves the protection of vulnerable people and enables fairness and due process to be considered and applied to this employment practice.

(e) **Preventative action.**

The Ombudsman's Office takes a cooperative approach with government that addresses fairness in administrative policy being developed by the executive branch of government. This is so that decision makers can be aware of aspects of proposed policy that might become the subject of Ombudsman investigation in the future.

This study demonstrates the ability of the Ombudsman's Office to draw on its expertise in fair process to provide preventative systems advice to reconcile apparently differing institutional and personal interests. There is

a unity in interest between individual fairness and broad public policy. The interest of children and vulnerable adults will be advanced by a screening process which does not deter competent people from applying to work with them. Limitations in the screening process must also be recognized so that a false sense of security is not created.

PART TWO: Issues of administrative fairness

(a) **A Definition of the Terms:** What is a position of trust and who should be checked?

It is essential to define clearly the target group who are subject to criminal record checks. Draft documents produced by government Ministries to date demonstrate careful examination of this issue. Appropriate action has been taken to define vulnerable people: children, mentally ill, mentally or physically incapacitated adults and adults whose custodial status restricts their ability to remove themselves from an abusive situation.

Trust positions are designated as those jobs having duties which bring the employee into contact with vulnerable people under circumstances where no other employee is present. Some well thought-out criteria for assessing opportunities for one-to-one contact have been applied, taking into account the chances for frequency and duration of that contact.

It is necessary to ensure general consistency within all Ministries of both the definition of vulnerable people and the employment designation. This will prevent gaps in protection to vulnerable people and avoid any arbitrary employment determinations. Private sector contractors with government are more likely to conform to government standards if criteria are clearly set out.

The employer must designate positions of trust carefully so that employees are not subject to an unnecessary and unwarranted invasion of privacy. Careful monitoring of job descriptions can respond to changes that might alter designations of trust positions. Individuals who do not come into direct contact with vulnerable people as part of their assigned responsibilities should not be included in the target group. For instance, there appears to be no justification for including the position of Ambulance Dispatcher as a position of trust, as it appears in a 1986 Ministry of Health Personnel Manual.

The purpose of this method of screening is to identify individuals who have a demonstrated history of behaviour that makes employment involving individual personal

contact with children and dependent adults inappropriate therefore, it is important that the checks be done on every individual who is working in a position of trust and that the check be done before that person begins working unsupervised. Checks should be completed for existing and prospective employees, people working relief or as substitutes, people occupying positions while on practicum as students, and people who are working as volunteers - as long as the same criteria for individual personal contact apply.

There is also a question as to whether or not it is sufficient to do the check on a one-time basis only. The Ombudsman's Office has received information which demonstrates that there has been no systematic checking of private sector contractors to ensure compliance with the present requirement of criminal record checking of employees and volunteers. Since the public and government clients have an expectation that criminal record checking will be done of target groups where the Ministries have announced that this will be a procedure, it is incumbent on government to ensure a follow-up mechanism to see that it has been done.

(b) **A Definition of Criminal Record Check: What is the Scope and Relevancy of the Information?**

It is clear from our discussions with complainants, employers and the police that there are competing interests in considering the extent of the criminal record to be checked. Employers have as their primary interest protecting vulnerable people and limiting their own legal liability. Employees have an interest in protecting their privacy, as well as ensuring that the information which the employer is considering is accurate. Police have an interest in protecting the public but also have an interest in maintaining some internal security over their police intelligence, protecting ongoing investigations which may be jeopardized by disclosure, and limiting their liability for release of information which cannot be verified or which may be inaccurate or incomplete.

At present there is a wide variation in the forms used for individuals to give their consent to the police to disclose criminal record information to the employer. There is also no uniformity in the data that is released by police forces across the province. Some police forces will disclose Criminal Code and federal statute

convictions only, others disclose provincial or federal statute charges and convictions and one force also discloses mere allegations of criminal conduct.

Two tests can be applied in reviewing the scope of information that should be released by the police. **The first is that exactly the same information that is being released to the employer must be given to the employee, applicant or volunteer.** This is an issue of fundamental fairness as the individual must know the information that the employer is considering so that it can be verified or corrected if it is inaccurate. **The second test is to ask what past conduct is confirmed by the information in the criminal record check.** Convictions, discharges and diversions are all indicators of past conduct that has been confirmed by an admission of guilt or a finding of guilt following a trial.

The case for considering outstanding charges is much less strong. An individual, who is presumed innocent until proved guilty, has yet to have the opportunity to be heard by a court on these charges. In a divorce case involving the interests of a 4 1/2 year old girl, Mr. Justice Spencer of the Supreme Court of British Columbia, ruled

that mentioning that one of the parties had been arrested and charged with a criminal offence which had not resulted in a conviction, was irrelevant and willfully prejudicial and would not be considered by the court in coming to a decision. [2] It is interesting also to note studies in the United States have shown that approximately 40-60% of all arrests and charges do not end in conviction. It is for this reason that in the United States where there are mandatory laws for the use of police record checks as an employment screen, charges over one year old are not considered.

Stays of proceedings are also commonly entered against individuals charged with offences, based on a number of considerations ranging from the lack of availability of witnesses to a Prosecutor's determination that there is inadequate evidence to continue a criminal prosecution. This background information is not available in a criminal record check which will just show that there was a charge and a subsequent stay of proceeding. Extreme caution should be exercised by any employer in considering information other than convictions. This is reinforced by the B.C. Council of Human Rights' view that criminal record information considered by an employer should be limited to convictions. There may be exceptions where an employer may find that outstanding charges relate directly to the employment position of trust.

It is also possible for individuals who have been convicted of offences under the Criminal Code of Canada to apply for pardons. A pardon is not granted automatically - it only follows a thorough community investigation by a police officer and is a means of formally recognizing that an individual has been rehabilitated and should not be unduly stigmatized by a conviction. **Offences for which pardons have been granted should not be released by police for the consideration of employers.**

It is fundamental to fairness that the same type of criminal record information be released to, and considered by, all employers - public and private sector. The information considered by the employer should not vary by police jurisdiction, since it is gathered for the same purpose; to determine if there is a record of criminal behaviour that would make an individual inappropriate to be employed in circumstances where direct personal contact with vulnerable people is involved.

Information concerning criminal record checks is being sought from two police information data bases. One is called "CPIC", the Canadian Police Information Centre.

The other one is referred to generally as the local Police Index. These data bases may be interconnected and both are compilations of computer profiles assembled about individuals based on information that is transmitted from original hard copy documents which can usually be referred to directly at a courthouse, police station or Crown Counsel's office. Like any computer information it is subject to error in filing, storage and retrieval. Ensuring accuracy is the reason that individuals should have access to the same information that is conveyed to their employer. The need to ensure accuracy is also a reason why the information that is released from those data banks should be verifiable by reference to hard copy information. **If a computerized criminal record is not supported by and derived from a specific document, report, witness, or other reliable way of weighing its value then release of that record should not be considered.**

There is wide variation in the province as to whether a fee is charged by the local police force for providing the record information and if so, by whom it is payable. **There should be a standard rule as to whether the employee or the employer bears the cost, if any, of a criminal record check.**

The police forces are also concerned about the staff time and budget allocations necessary to meet the demand to supply criminal record checks. The Vancouver Police Department kept the following statistics on the number of requests received for criminal record checks for employees and volunteers in positions of trust: In 1983 there were 296 requests in 1984 there were 751 requests, in 1985 there were 2,053 and in the first seven months of 1986 there were 1,973 requests.

(c) **Assessing the Relevancy of the Information**

Section 8 of the Human Rights Act of British Columbia states that no person shall discriminate against a person with respect to any term or condition of employment because of a conviction for a criminal or summary conviction charge, that is unrelated to the employment or intended employment of that person.

The information received by the employer must be assessed on the basis of the relevancy of the criminal record history to the duties and responsibilities of the designated trust position.

Determining if the criminal record information is relevant to the employment is a crucial decision both for the employer and for the employee. The underlying question in assessing criminal record data is; in what circumstances and in what ways is criminal record history predictive of employee behaviour?

Policies that apply to government employees state that a case-by-case assessment of each individual's record will be taken, applying criteria such as the circumstances of the offence and of the offender at the time, and changes that have since occurred.

However, the Foster Home policy of the Ministry of Social Services and Housing states that any person with a previous record of sexual abuse or violence will not be considered as a child care resource or for any other child care service.[3] Criteria similar to those used for evaluating government employees' records are then applied to assess those people whose recprds do not involve sexual abuse or violence..

The process of assessment was reviewed pursuant to the B.C. Human Rights Code in the case of McCartney vs. Woodward Stores Ltd. (1982), 3 C.H.R.R. D/113, which considered a complaint of discrimination on the ground of

criminal conviction. The store refused to promote the complainant to a maintenance position and terminated his employment as a stockroom clerk when it was discovered during a security check that he had been convicted for shoplifting 8 1/2 years earlier. The complainant had not disclosed his conviction when he originally applied for employment. The employer argued that the Human Rights Board of Inquiry must not examine the conviction or the circumstances surrounding the conviction, but should restrict itself to considering if the charge related to employment. At page D/1120 the Board rejected this argument:

> "Such an interpretation would imply that an employer may decide that convictions for a particular list of offences under the Criminal Code will inherently preclude employment. It would only be necessary for an employer to go through the Criminal Code and tick off "yes" or "no" beside all possible offences, then screen candidates through a simple matching process. While presumably a Human Rights Code Board of Inquiry could review an employer's decisions about whether or not to include a given offence, it could not review individual decisions about persons who had committed them."

In view of the statutory requirement that the charge must relate to the employment or intended employment, the Board reasoned that an examination of the circumstances of the charge or conviction was required. The following guideline was established by the Board to determine whether the charge was related to the employment (at page D/1121):

> "1. Does the behaviour for which the charge was laid, if repeated, pose any threat to the employer's ability to carry on its business safely and efficiently?
>
> 2. What were the circumstances of the charge and the particulars of the offence involved, eg. how old was the individual when the events in question occurred, were there any extenuating circumstances?
>
> 3. How much time has elapsed between the charge and the employment decision? What has the individual done during that period of time? Has he shown any tendencies to repeat the kind of behaviour for which he was charged? Has he shown a firm intention to rehabilitate himself?"

Applying these factors to the facts in this case, the Board of Inquiry concluded that the termination of employment was without reasonable cause, while the refusal to promote the complainant was justified. On appeal the decision was affirmed by the Supreme Court of British Columbia and the Court specifically adopted the interpretation proposed by the Board.[4] **These guidelines should be adopted and will necessarily involve discussions with the employee, applicant or volunteer in assessment of any record of concern.**

There is currently a great deal of variation in who makes the decision as to the relevance of criminal record information. That reflects the fact that this criminal record policy involves different employers. In the public sector a Deputy Minister of the appropriate Ministry has the responsibility.

Where a society, company or an individual is contracting to provide a service to vulnerable people and is receiving payment for services from the provincial government, it is that society, company or individual who is responsible for

kept confidential. Employers should be aware of both the assessing the relevance of criminal record information of any of their employees. There are currently no standard criteria used in the private sector to assess relevancy.

It is important that decisions be made consistently to ensure similar standards for protection of vulnerable people; to encourage confidence in public services and so that people training or applying for employment in positions of trust will be able to place some reliance on assessment standards.

(d) Confidentiality and Liability

At present all police forces in British Columbia are bound both by internal R.C.M.P. directives applying to the use of CPIC and by the federal Privacy Act restrictions on the release and dissemination of criminal record information. Police are properly concerned that safeguards be provided in order to ensure the confidentiality of the criminal history information that agencies and employers receive.

Employers must also be sensitized to the potential negative impact on their employees' reputation and further employability if a staff member's criminal record is not

criminal and civil penalties for unauthorized release of confidential criminal record information. It is a reasonable expectation that employers both in the private and the public sector should give a written guarantee to the employee, job applicant or volunteer about the limitation placed on the use of the criminal record information.

There is a risk of civil liability for defamation in any case where a person alleges that another person has committed a criminal act. (Truth is a complete defence). This emphasizes the importance of police and employers keeping and using information that is accurate at all times. The Vancouver Police Department has received a legal opinion which supports the proposition that the police will reduce their liability as long as they are releasing the same information to both the employer and to the person consenting to the release of information and as long as they are doing it in the absence of malice and with a genuine belief that the information provided is true.

Although all written government policies stress the highly confidential nature of the information obtained through criminal record check procedures, there appears to be no

standard method in place for safeguarding information. It has been proposed that existing public service employees occupying positions of trust will have their privacy maintained by having their criminal records checks sent by police to an independent agency that will assign each one a code. The agency will advise the appropriate Deputy Minister of the results of the criminal records check. If there is a record of concern the Deputy Minister will request the employee name corresponding to the coded record and the employee will be notified of the opportunity to make an explanation. This procedure will protect employees who have a criminal record that is irrelevant, from being identified.

Since the implementation of criminal record checks for positions of trust in the public service, people hired have had their police record information received by Personnel Officers, and if any record exists, reviewed by the senior manager of Personnel and ultimately by the Deputy Minister. All existing personnel policies emphasize the importance of safeguarding this information. It is recommended that a draft public service directive statement that the principle of

protecting individual privacy will take precedence over the requirements of administrative expediency, be adopted as policy.

There have been no guidelines developed for the private sector to ensure confidentiality. The Ombudsman's office is impressed that the Elizabeth Fry Society is assigning codes to the criminal record check documentation of its employees for two reasons. First, so that these records can be reviewed by the Board of Directors without revealing the identity of the employee unnecessarily and second, to comply with the clause of its current contract with the Ministry that states "...that the Society will make available to the Superintendent of Family and Child Service, or his representative, upon request, criminal record check documentation ensuring that suitable screening of employees or volunteers has been carried out". Some societies believed, on the basis of that wording of their contracts, that they were expected to reveal the identities and criminal record histories of their employees to the Ministry of Social Services and Housing.

The issue of confidentiality is related to basic principles of fair practice as it relates to employment issues. There should be no personnel data or record-keeping systems as a result of this screening method whose very existence is secret. There must be a way for individuals to find out what information about them is in a criminal history record and how it is going to be used. There must be a way for individuals to prevent this personal information obtained for one purpose, being used or made available for other purposes without their consent. There must be a way for individuals to correct or amend a record of criminal history about themselves. Any agency that is creating, maintaining, using or disclosing records of that identifiable data must assure not only the reliability of its data for its intended purpose but must also take reasonable precautions to prevent misuse of that data. There appears to be no reason why the same standard of confidentiality should not be applied throughout the Ministries and the private sector concerning criminal record information.

(e) **Appeals**

It is assumed that accuracy of the police record information will be determined upon its first disclosure. Since employees will be privy to the same information as employers there will be opportunity for correction. If there is any concern whatsoever about the relevancy of the information in the police record check then it is presumed that the individual and the designated official of the employer will have the opportunity to discuss all the circumstances surrounding the record.

There has been little attention paid to an appeal procedure for individuals who are adversely affected by an employer's decision that their record relates to their employment.

Employers should provide information regarding appeals should an individual wish to pursue a complaint that an employer has taken irrelevant criminal history considerations into account in making an adverse decision. It is a matter of basic fairness that any decision adverse to an employee or applicant should be accompanied by the reasons in writing, and should set out the provisions for an appeal. It is established that

existing public employees will have an appeal pursuant to the provisions of the Collective Agreement. We are confident that the current Collective Agreement grievance procedure provides appropriate checks and balances to ensure that matters of fairness and natural justice are adhered to. The Public Service Act provides an appeal to the Public Service Commission for competitions to and from within the Public Service where proper consideration of merit has not been complied with. This will undoubtedly be a formal appeal where an independent Public Service Commissioner will hear each side present their cases and then make a decision. Such an appeal will be time limited, will have a record established and decisions will be given in writing. An administrative tribunal such as this will also be subject to judicial review.

For both public and private sector employees there is an independent appeal available through the complaint procedure under the Human Rights Act of British Columbia for discrimination where an irrelevant criminal record has been taken into account in making an employment decision. Although individuals may receive a fair hearing before the Human Rights Council of British Columbia, there is a recognized problem with the delay between complaint,

hearing and decision. The complaint procedure is the only avenue of access to an independent appeal process for private sector employees. Although implementation of a fundamentally fair screening policy will reduce the likelihood of appeals, it is essential that any complaint must be heard in a timely manner. **The Human Rights Council of British Columbia should monitor the volume of employee complaints about criminal record screens and must be given sufficient resources to deal expeditiously with them.**

PART THREE: A Study of U.S. and Canadian Experience

(a)United States

In considering the use of criminal record information to screen individuals working in positions of trust with children, it is helpful to turn to the United States' experience and to note their findings to date. The United States has a different historical experience in the use of criminal record checks than does Canada. For instance, 41 of the states already require criminal record screening for such diverse work as operating a bowling alley, running a bingo, being a plumber, undertaker or cigarette salesperson, pawnbroker, marriage counsellor, or clairvoyant. Most states also have legislation which allows an individual to obtain a copy of their criminal record to challenge its accuracy, much in the same way that in British Columbia individuals can correct information on their credit rating report. Reducing employer risk has been a key motive in using criminal record checking as an employment screen in the U.S. On the assumption that criminal history information can be predictive of job performance, employers have attempted to limit their risks and costs by screening out individuals with convictions that are directly job related.

The effectiveness of using criminal record screens to protect vulnerable people has had a mixed review in the United States. It has succeeded in identifying a very small number of people who have committed crimes against children, thus screening them out of those specific jobs before they could cause children further harm. However, advocates of screening also contend that general awareness of the screening process will deter inappropriate people from entering or remaining in positions where they will have contact with children.

There is concern that mandatory criminal record screening leaves the public with a false sense of security, particularly in the case where criminal history record checks are conducted on a one-time only basis. Licencing and employment screens typically revealed that only between 5% and 8% of people screened have any criminal record whatsoever. Statistics from New York City and the State of California, both of which have had mandatory fingerprinting and criminal record screening of all child care facility employees since 1984 have revealed that less than 1% of those screened had prior, related records. [5]

It has been reported that the FBI files which are used in the criminal record screens in the U.S. are not necessarily complete, accurate or up-to-date. Records do not specify whether or not assault victims have been children or adults. The files also contain no records on juvenile offenders unless they were tried as adults. The lack of juvenile records is of concern given research that suggests that 58% of all pedophiles committed their first sexual offence as adolescents.[6]

There has also been concern that criminal record screens have an adverse impact on racial minority members who may be arrested and convicted in numbers disproportionate to the total population. Particularly in inner city areas where youth services attract minority group applicants, a high rate of applicant criminal records have warranted careful assessments to ensure that criminal record screens do not operate as a basis for racial discrimination.

Critics have suggested that the cost of criminal record screening will divert new funding that is critically needed for child care and youth services into a bureaucratic record processing system that is going to be minimally effective in protecting children.

(b) Canada

Alberta, Saskatchewan, Manitoba and Ontario have all recently implemented policies on the use of criminal record screening for positions of trust. None of these have been in place long enough to rely on their experience but it is interesting to note their distinctive points.

Alberta

At present, Alberta's policy applies to government employees only. A position of trust is one in which an employee can exercise "control" over a client, through contact. Interestingly, the policy recommends that the requirement for a criminal record check not be included in recruitment advertising. The top ranking candidate receives a letter from a personnel officer requiring compliance with such a check. The onus is on the applicant to go to the RCMP, be checked and take the resulting record certification back to the employer. The criminal record data is automatically made known to the applicant in this manner. Any record as provided by the applicant to the employer will be destroyed at the conclusion of the competition. Criminal records are not

placed on any competition, personal or departmental files - there is only a designation that a criminal record check was complied with.

Policy provides that outstanding charges are, at best, very doubtful indicators of job performance and are not to be given the same weight or meaning as convictions. Pardons are not considered at all.

Records are assessed by a Personnel Director and the Manager of the position to be filled. No appeal process is considered. The use of criminal record checks as employment screens in Alberta has also been extended to those positions in contact with restricted drugs, large amounts of cash or goods and highly confidential information.

Saskatchewan

Saskatchewan has instituted a pilot project to conduct criminal record checks for out-of-service applicants for positions providing Family Support and Young Offender services. It must be stressed that this is only a proposal of what an eventual policy might include. It

will be monitored to evaluate its effectiveness in screening out applicants who are unsuitable for work with youth by reason of their criminal record. In the proposal statement, an applicant's current ability to serve as an appropriate role model is the paramount consideration. Charges and convictions of criminal offences for which no pardon has been granted, will be considered. Records will be sent by police to personnel officers who will then discuss any record of concern with a more senior level committee. A Deputy Minister or the Public Service Commission may make a final decision affecting employment. Specific information pertaining to criminal records will be destroyed upon completion of the competition but generic information regarding individual decisions will be kept for a precedent file of past practice. No appeal process is considered in the proposed policy draft.

Manitoba

In Manitoba, it is noteworthy that criminal record checks were instituted as a change in the legislation affecting all private sector employees in day care centers and family day care providers. Job offers are made to

individuals, contingent on their disclosure of any outstanding charge or conviction under any federal or provincial legislation. The individual authorizes disclosure of this information directly to Provincial Child Care Division. Unrelated criminal records, in the opinion of personnel officers, will not be reported to the private employers. Related records will be reported to the employer and the individual employee. Where a dispute arises over whether a criminal record history is relevant the matter must be referred to an independent, nine member Day Care Staff Qualifications Review Committee which will make a final and binding decision. This is an excellent Appeal model.

Ontario

Ontario's criminal reference checking is a condition of employment for all programs directly operated by the Ministry for positions involving either direct services or the care or custody of children and dependent adults. It is designed to screen out people who have a record of criminal convictions which would make them unsuitable for employment in a position of trust where the Ministry bears responsibility for ensuring the safety and well being of children and dependent adults.

The check consists solely of a CPIC check to obtain outstanding charges and convictions under the Criminal Code of Canada for which a pardon has not been granted. A successful competition candidate will be asked to authorize police to disclose their CPIC record to their employer. These authorizations are forwarded to a branch of the Ministry of Community and Social Services called the Investigations Unit which is similar to the Police Services Unit of the Attorney General in B.C. This Investigation Unit obtains the information from CPIC and advises the regional personnel manager. The actual record is retained by the Unit. If, following an assessment by the Director of the Ministry, an adverse decision is made, no appeal is provided for.

Ontario, Manitoba, Saskatchewan and B.C. all have statements in their consent-to-disclosure forms that the presence of a criminal record does not automatically preclude consideration for employment. Only Ontario provides a guarantee on the form that the information will be kept in strictest confidence by the employer. There is a wide variation between provinces of the type of information being included in a criminal record check.

The policy objectives in asking for disclosure of that information are equally varied, ranging from an emphasis on security and liability, to providing appropriate role modeling, to the safety and well-being of children and dependent people.

PART FOUR: Public Policy Issues

(a) Legislative vs. administrative: diverging policy trends

There are two diverging trends relating to the issue of employment screens in Canada, both of which are reflected in British Columbia. On one hand there is increasing legislation that acknowledges the right of privacy of the individual. Legislators in the '80s have seen fit to guarantee all Canadian citizens the right of security of the person and the right to be secure against unreasonable search by the Canadian Charter of Rights and Freedoms. The federal Privacy Act limits the collection and disposal of personal information about individuals. It also provides individuals with some right of access to that personal information as it is stored in federal government data banks. The federal Access to Information Act restricts release of information in data banks to third parties.

The meaning of human rights legislation in British Columbia was the subject of comment by the Supreme Court

of Canada, in 1982. In the case of Insurance Corporation of B.C. v. Heerspink, Mr. Justice Lamer stated:

> "When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or some other enactment, it is intended that the Code supersede all other laws when conflict arises.... It should be recognized for what it is, a fundamental law. Furthermore, as it is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection."[7]

The Human Rights Act of B.C. proclaimed in 1984 provides some protection against invasive questioning by stating that it is discrimination to make employment decisions based on criminal convictions that are not related to the employment.

All of these changes have been accompanied by full debate in Parliament and in the legislature, with review by people who are publicly accountable through the electoral process and who are there to serve the public interest.

The other trend is a noticeable increase in administrative policy collection of personal information about employees for employment decisions. This is being implemented unilaterally, without the opportunity for public debate or review, and contrary to the spirit of the legislative recognition of privacy rights. To use an example: a vacancy for a Building Security Officer for Consumer and Corporate Affairs, Liquor Distribution Branch was advertised in the government publication "Postings". The advertisement stated that all applicants were subject to security clearance including a CPIC and a credit check. After being contacted by the Ombudsman's Office, the Ministry agreed that the vacancy would be re-advertised, this time without the unusual requirements.

(b) Impact on existing policy

It must be recognized that the requirement of a criminal record check as a condition of employment has a real danger of fostering a bias against those who have any criminal record whatsoever. This goes counter to an emphasis in our criminal justice system on rehabilitation of a convicted individual and integration of that person back into the community as a contributing member as quickly as possible. The information about the pardon process should be more widely available in the criminal justice system.

It should be kept in mind that there are certain groups in our society who are arrested, charged and convicted disproportionately to their numbers in our population. For example, Native people comprise between 16-18% of the adult population in B.C.'s correctional institutions. Children of Native Indian heritage are also apprehended from their families in a similarly disproportionate manner compared to their numbers in the population. The Ministry of Social Services and Housing has developed special policy that applies to Native Indian children who require foster care. Specific recruitment policy is to place

these children with their extended family or their tribal family or other Native families. These priorities reflect a legitimate and vital concern that these children not be alienated from their communities and culture. However, the Ombudsman's Office has received reports that due to misunderstanding of the purpose of criminal record checks of foster parents and their dependents 18 years or older residing in the home, this police record check policy has worked to discourage the recruitment of Native foster homes. All possible care should be taken to ensure that such misunderstandings do not limit the effectiveness of two public policies that both uphold the interests and protection of children. **Although no different standard should ever be used for positions of trust with Native children, sensitivity must be used in ensuring that the criminal record check policy does not defeat provision of Native child care services to Native children.**

If police record checks are going to be a permanent condition of employment for positions of trust with vulnerable people, **then consideration should be given to incorporate this criteria into the calendars and career descriptions of universities and colleges which train people to work in these fields.**

(c) **Systemic Resolutions**

One of the systemic problems with the use of criminal record checks as an employment screen in British Columbia is that there are both public and private sector employees and employers involved, with quite different employment practices. One method of resolving the difference of process would be to establish an independent, regulatory agency, funded by government. This agency could be authorized by the Attorney General to receive criminal record information directly from the police. Personnel with knowledge of the positions of trust and training in record assessment could decide whether or not the record was relevant and notify the employer accordingly. This would centralize the receipt of criminal history information - ensuring standardization of information received. It would also keep irrelevant criminal record information out of the hands of employers and eliminate the potential for bias against those who have unrelated records. It would control confidentiality as the record would not be disseminated from there.

One agency reviewing all criminal history records would be in the best position to make uniform decisions on whether to terminate or hire. This would ensure a similar standard for employment throughout the province. It could also serve to limit the liability of any employer by taking responsibility for the accuracy of the information acted upon. This agency, rather than individual employers, may be in a better position to absorb the cost of making several checks, particularly where individuals have been transient. The existence of such an agency may also solve the problem of individual contractors who are giving services to children or dependent adults with no 'director' above them to review their criminal record. Adverse decisions could be given in writing along with information regarding appeals, appropriate to whether the employer is public or private sector.

An alternate method that could work to minimize discrepancies between decisions in the public and private sector is to have government identify the administrative fairness concerns, set a minimum standard for the use of criminal records as an employment screen for positions of trust and incorporate that standard as a condition of contracting for services with private sector societies,

companies and individuals. Although government is anxious to maintain its armslength relationship and does not wish to interfere with employer and employee relationships in the private sector, it is appropriate for government to set a standard of administrative fairness that is required of independent contractors in implementing criminal record check procedures. When the Ministry of Social Services and Housing made criminal record checks a condition of contracting for independent contractors, its policy provided that Ministry staff could provide the Ministry's Foster Home Guidelines for Review of Criminal Records to contractors for their information. Government could also have its licensing boards such as the Provincial Child Care Facilities Licensing Board and the Provincial Adult Care Facilities Licensing Board adopt a standard of administrative fairness that would be required of its licensees.

This method is less expensive than establishing one centralized independent agency, and would work to keep the decision-making at the local level where the services to vulnerable people are delivered. There is an increasing trend to implement child abuse prevention plans at the community level and to have cooperation between private

sector agencies, local Inter-Ministerial Committees and the police, in training and sharing expertise in the use of criminal record checks as they affect services to children and vulnerable adults can be viewed as one part of a comprehensive community prevention plan.

(d) **Standards of Fairness**

No matter which model may be used to implement policy, there are standards of administrative fairness that are applicable to both public and private sector employment practices in the use of criminal record checks. The following recommendations represent a fairness standard below which many employers currently fall.

(1.) **The following should be standardized across all Ministries:**

- **the designations of position of trust for vulnerable people**
- **the identification of the target group to whom the checks will apply**
- **the completion of checks before new employees commence positions of trust**

- the definition of the information that the employee is consenting to be released
- the definition of the criminal record that the employer will consider
- the method by which the employee is made privy to the criminal history information
- the factors used in assessing relevancy of criminal record history to the employment
- the guarantee confidentiality of the employee's criminal record and its use
- the communication of adverse decisions in writing, outlining the appeal process.

(2.) Since positions of trust with vulnerable people are so important,it may be necessary to assure some special training for those who are interviewing candidates for those positions. Similarly, since the use of criminal record data is an extraordinary employment screen, there may be some training required, in techniques for reading and assessing criminal record information. This may also involve the circulation of generic records of past practice decisions on the relevancy of records to employment.

(3.) Consent forms that job applicants, volunteers and employees are asked to sign to authorize disclosure of criminal record information should be standardized to state the following in order to be a legitimate and informed consent:

- specify the information that the individual is consenting to being released
- specify the information that the employer will consider
- specify that the employer will make all information released, available to the individual
- specify that the employer will assure confidentiality of that information once it is disclosed.

It is not appropriate that some employees be asked to waive their right to actions in negligence or defamation against the police, in order to be considered for employment. This practice has only affected those being checked by Vancouver Police Department, which has incorporated a waiver into the consent forms which individuals are required to sign. Such a waiver removes one of the most important deterrents to abuse or neglect in the use of police record check information.

(4.) **Confidentiality concerns warrant very high standards in the restriction of the use, storage, dissemination and destruction of criminal record histories.** Disclosure of this information may not only adversely affect employment and training opportunities but may also restrict an individual's insurance, credit, housing and otherwise damage a reputation. All possible care must be taken by the police and employers in safeguarding this information.

(e) <u>The use of criminal record checks in context: does it meet the objective of protecting vulnerable people?</u>

Criminal record checks alone are not going to be an effective method of protecting vulnerable people. There are other methods of screening, which used in concert with a criminal record check, can form a comprehensive program to screen inappropriate people from these positions of trust.

Several associations in B.C. have devoted a great deal of time to working out multi-faceted screens with the express purpose of safeguarding children to whom the associations

are delivering services. Particularly noteworthy is the process instituted by the Big Brothers of Greater Vancouver Society. This organization has had to be specially aware that the opportunities it provides for volunteer activities with young boys may attract pedophiles or child molesters. Accordingly, the Society has used criminal record checks for the last decade and considers them a useful, albeit limited tool. All volunteers are alerted to the requirement of disclosing their criminal record at the time they apply to the society. The obligation remains on the prospective volunteer to comply with the check and to bring the results of the check to the society where it is considered as one part of the screen.

Volunteers are asked to supply four references - including a family member or close relation, a current employer, a medical doctor and one other. All references are checked in writing - no reference goes unchecked. The volunteer is asked to attend an initial orientation of about 2 hours, another group interview taking roughly 2 hours and undergoes a series of one-to-one interviews of about 4 hours altogether which are conducted by social workers.

Volunteers are expected to give a personal history resume where there is no gap in time unaccounted for. Volunteers will be asked situational questions to determine their knowledge, experience and reactions in dealing with abusive situations. This all must occur before a volunteer is considered as eligible to have any contact with a child. The Society follows up on all volunteer performance and monitors a standard of conduct. It is also considering repeating criminal record checks on a regular basis. Two other interesting components of the Society's screening procedure are to keep their own staff up-to-date and continuously trained in the field of abuse prevention and to ensure that every child in contact with a volunteer has had some child abuse prevention training. This Society has set an excellent example of how criminal record checks can be integrated into part of a broad range of employment screens in order to be most effective.

In order that the public not be given a false sense of security, it is important that the limitations of these checks be recognized. Employers must continue to require and check references, to request "no gap" personal, academic and work histories, to carry out face-to-face

interviews and to set clear expectations of staff conduct for positions of trust. It is vital that the public and the private sector follow through consistently in this comprehensive practice.

(f) **Measures of Effectiveness**

The Ombudsman's Office is aware that several important studies on child abuse in the school system released in the fall of 1986, have advocated the broad implementation of criminal record checks. It is agreed that a criminal record check may help prevent one individual from obtaining one job, on one specific day. In light of the emerging evidence that some offenders are attracted to employment with children and other vulnerable people and that one offender may abuse many victims, this may justify subjecting thousands of people who have no related, or no criminal records at all, to this extraordinary employment screen.

Our review of the current practice of the use of criminal record checks as a condition of employment indicates that there are many administrative fairness issues that must immediately be addressed. It is in the common interests

of government and private sector employers, employees, police forces and general society to have a fair and effective policy in place before further application of this practice.

Prior to any further efforts to expand the use of criminal record information as a condition of employment beyond positions of trust with children and other vulnerable people, it is essential for government to undertake an evaluation on the effectiveness of this program to date.

PART FIVE:

Conclusions and Recommendations

This report examines the use of one response to a contemporary "crisis in confidence" in public services to vulnerable people: checking the criminal records of people working, applying or volunteering for those positions which will bring them in close contact with children and dependent adults. The use of criminal record checks is a complex issue - not only involving issues of liability, and privacy, but having an impact on existing human rights, criminal justice and employment policies. Criminal record checks alone will not be an effective method of protecting vulnerable people but can be regarded as one of a number of tools that can be utilized in establishing public services where children and vulnerable adults are not at risk.

The Inter-Ministerial Committee which has as its task establishing consistency within the government ministries has approached the use of criminal record checks with a great deal of careful consideration. The Sullivan and B.C. School Trustee Reports have also addressed this issue. B.C. Civil Liberties Society has been monitoring

this area with a great deal of interest following its preliminary brief on the topic in February 1986. The joint submission of the British Columbia Government Employees Union with the Professional Employees Union, B.C. Nurses' Union and the Union of Psychiatric Nurses has also provided some important views. The B.C. Association of Chiefs of Police has devoted some serious consideration to this issue and provided a frank and helpful dialogue with the Ombudsman's Office.It is appropriate that a broad spectrum of the population be involved in the discussion of this extraordinary method of screening precisely because of the number of citizens who are affected by it.

The widest interests of society are best served when the public can place real confidence in a screening process that does not deter competent people from providing services to vulnerable people. The Ombudsman's recommendations are directed at the development of a comprehensive, administratively fair and effective screening process.

Summary of major recommendations:

1. That government incorporate the principles of administrative fairness as outlined in this report in

implementing policy making criminal record checks a condition of employment for individuals working in positions of trust with children and other vulnerable people. (p.57)

2. That government evaluate the effectiveness of this policy prior to any expansion of this condition of employment beyond positions of trust with children and other vulnerable people. (p.58)

3. That designations of positions of trust based on contact with vulnerable people be consistently defined. (p.14)

4. That criminal record checks be completed prior to new employees commencing positions of trust unsupervised. (p.15)

5. That government verify that criminal record checks have been completed by independent contractors providing services to children and other vulnerable people. (p.15)

6. That the same criminal record information be released to employer and employee so that there can be an opportunity to correct it and to place it in contest. (p.17)

7. That the same type of criminal record information be released to public and private sector employers by all police forces. (p.19)

8. That no criminal record information be released that cannot be verified by reference to a specific document, report or witness. (p.20)

9. That the method and amount of payment for a criminal record check be standardized. (p.20)

10. That the guideline to determine the relevancy of the criminal record information to the position of trust is that used by the Human Rights Board of Inquiry, subsequently approved by the Supreme Court of British Columbia. (p.24)

11. That employers provide the employee or volunteer with a written guarantee of the limitations of the use of the criminal record check information. (p.27)

12. That individual privacy for the employee or volunteer will take precedence over administrative expediency. (p.29)

13. That employers supply reasons in writing for adverse decisions to employees or applicants, stating the provisions for an appeal. (p.31)

14. That the Human Rights Council monitor its volume of complaints and receive adequate resources to enable decisions to be made expeditiously. (p.33)

15. That information about the pardon process should be widely available in the criminal justice system. (p.46)

16. That the criminal record check policy be carefully publicized so as to ensure that appropriate Native child care resources are available to Native children. (p.47)

17. That a standard of fairness be incorporated into administrative policy affecting both the public and the private sector with reference to standarizing the

consent forms, the disclosure of information, training to analyze the information and the confidentiality of the information. (pp.51-53)

18. That criminal record checks be recognized as limited in effectiveness and should be one part of a comprehensive employment screen. (p.56)

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